United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

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75-4060

United States Court of Appeals

For the Second Circuit

Docket No. 75-4060

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P/S

SEMION BRONSZTEJN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for Review of Order by the
Board of Immigration Appeals

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondent, in urging affirmation of the decision made by the Board of Immigration Appeals, emphasizes two aspects of the case. One is an irrelevant fact, the other an erroneous statement regarding the rule of construction of law in deportation cases.

THE IRRELEVANT FACT

The respondent places emphasis on an uncorroborated affidavit, filed by a policeman who stated that the petitioner's apartment contained "more than six pounds of marijuana and 154 LSD pills" (Resp. br. 2).

It is established law that in Immigration cases consideration of the deportation charges may not go behind the criminal record and that the Court considering deportability may not "review the evidence and render an independent judgment on the guilt or innocence of the alien involved" (App. 4 and cases cited there).*

The defendant's plea of guilty did not admit the facts contained in the policeman's statement. The statement should not have been included in the criminal record. It is not any more relevant to the issue in the case than the petitioner's claim of innocence despite his plea. The affidavit is not in the "Joint Appendix". Had the government desired to include it, an objection would have been made by the petitioner; a motion to strike would have followed.

The improper inclusion in the record of this prejudicial evidence was covered in the oral argument before the Board of Immigration Appeals (App. 13-15). It was said there and is repeated here that had there been actual evidence connecting the petitioner with the drugs, he would not have been permitted the plea of attempted possession which in itself is conceptually difficult and is an obvious result of plea bargaining.

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* All references are to the printed Appendix, except where reference is made to the Respondent's brief (Resp. br.).

The sole issue before this Court is whether the plea of guilty to §110 of the New York Penal Law, as a matter of law, is covered by §241(a)(11) of the Immigration and Nationality Act.

DEPORTATION LAW MUST BE STRICTLY CONSTRUED

Respondent's statement (Resp. br. 5) that "the statute which defines the deportable class should be liberally construed," citing Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967), is contradicted by numerous decisions of the United States Supreme Court. The Court has consistently ruled that deportation is a civil sanction and that the alien under deportation is not covered by the Constitutional protection granted criminals. But because "deportation is a drastic sanction, which can destroy lives and disrupt families", the Supreme Court has always urged that the legal provisions of the deportation law should be strictly construed. Gordon and Rosenfield, Immigration Law and Procedure, §4.1c pp. 4-7; Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948); Gastelum Quinones v. Kennedy, 374 U.S. 469, 479, 83 S.Ct. 1819, 10 L.Ed.2d 1013 (1963); Barber v. Gonzalez, 347 U.S. 637, 643, 74 S.Ct. 822, 98 L.Ed. 1009 (1954); Bonetti v. Rogers, 356 U.S. 691, 78 S.Ct. 976, 2 L.Ed.2d 1987 (1958); Rosenberg v. Fleuti, 374 U.S. 449, 462, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963).

In urging "liberal" construction of the deportation law (Resp. br. 5) the Respondent states that Congress in its legislation relating to narcotics offenders has been increasingly severe and that the 1960 amendment of §241(a)(11) specifically included marijuana.

On the other hand Congress has indicated and the Courts and the Board of Immigration Appeals have interpreted the Congressional wish that the increasing severity of the legislation addressed itself primarily to <u>traffic</u> in narcotics.

Since 1960 the public attitude toward the use of marijuana has fluctuated but there is general recognition that it is used extensively. Several states have legalized possession of marijuana, among them Alaska, Oregon, Colorado and Maine. Others have reduced the penalty for possession to 90 days or less (California, Washington, Kentucky, South Carolina, Pennsylvania and Hawaii) and reform legislation is contemplated by others (Wisconsin and Michigan). It is believed that with an increasing number of states decriminalizing possession, the text of §241(a)(11) should be strictly construed and while for the time being the Court is bound to find an alien deportable if convicted of possession, this does not necessarily include a completely different offense, less serious than possession, namely "attempted possession".

Respondent's brief (p.8) renders lip service to the fact that the petitioner had pleaded guilty to §110 of the

New York Penal Law, but in attempting to distinguish the case from Varga v. Rosenberg, 237 F.Supp. 282 (S.D.Cal.1964) the respondent treats the facts as if the petitioner should have been convicted of "possession".

VARGA v. ROSENBERG IS IN POINT

The petitioner was not convicted of possession of marijuana and thus respondent's statement (Resp. br. 8) that he had "dominion and control" over the narcotics, mention of which has been improperly included in the record of criminal conviction, is incorrect. If the petitioner had "dominion and control" he would have been "in possession". "Attempted Possession", whatever it may be, precludes "dominion and control".

CONCLUSION

The arguments in opposition to the petition are irrelevant and erroneous. The petition should be granted.

Respectfully submitted,

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